

SC 87154

IN THE SUPREME COURT OF MISSOURI

MISSOURI ASSOCIATION OF CLUB EXECUTIVES, INC., et al.

Respondent

v.

STATE OF MISSOURI,

Appellant

APPELLANT'S REPLY BRIEF

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ARGUMENT

- I. The circuit court erred in holding that HB 972 violated Mo. Const. Article III, § 21, because the bill did not change its original purpose, in that HB 972's original purpose was to create new crimes and enhance the penalties on existing crimes and its purpose remained the same throughout the legislative process.**

The Missouri Association of Club Executives (hereinafter “MACE”) argues that the provisions in HB 972 regarding the regulation of sexually-oriented businesses resulted in a change of HB 972's original purpose because the regulation of sexually oriented businesses is not related to alcohol related-intoxication offenses. But this court has consistently held that such a strict relationship between a bill’s original title and subsequent provisions is not required.

In fact, the change of purpose prohibition is “designed to prevent the enactment of statutes in terms so blind that legislators themselves ... (would be) ... deceived in regard to their effect, and the public, from difficulty in making the necessary examination and comparison.”¹ The change in purpose prohibition is not designed to "inhibit the normal

¹*Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 38 (Mo. banc 1982).

legislative process, in which bills are combined and additions necessary to comply with legislative intent are made."²

Amendments that are germane and reasonably relate to the object of legislation are not prohibited, even if those amendments introduce new matter to the underlying bill, so long as they are germane to the original purpose of the bill.³

Each of the amendments in HB 972 relate to the original purpose; i.e. crime. Thus, HB 972 is like the statute at issue in *C.C. Dillon Co. v. City of Eureka*.⁴ MACE argues that *C.C. Dillon Co.* is not applicable because billboard regulation reasonably relates to transportation; whereas alcohol-related intoxication offenses have no relationship to adult businesses. But the court in *C.C. Dillon* did not adopt such a stringent test. In fact, the *C.C. Dillon* court found that the introduction of billboard regulations into a bill relating to transportation did not change the bill's original purpose because both federal and state governments recognized that the transportation system is "impacted" by effective control of outdoor advertising structure.⁵

Likewise, alcohol-intoxication related traffic offenses are reasonably related to the regulation of adult businesses, as both restrictions relate to crime. In addition, it is

²*Blue Cross Hosp. Service, Inc. of Missouri v. Frappier*, 681 S.W.2d 925, 929 (Mo. banc 1984).

³*Lincoln Credit Co.*, 636 S.W.2d at 38.

⁴*C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322 (Mo. banc 2000).

⁵*Id.* at 327-328.

certainly possible for sexually oriented businesses to sell alcoholic beverages. And these alcohol sales, in turn, certainly “impact” intoxication-related offenses.

Additionally, in *Missouri State Med. Ass’n v. Mo. Dept. of Health*, this court held that a title change from “relating to insurance coverage for cancer early detection” to one of “relating to health services” was appropriate, as were several additions to the bill involving health services.⁶ In other words, the bill evolved from a bill relating to a very specific type of health service (insurance coverage for cancer early detection), to a much broader one (a bill involving health services). Likewise, the bill issue at issue here evolved from relating to a specific type of crime (intoxication-related offenses), to a broader one (a bill relating to crime). However, the evolution at issue here is no more far reaching than that at issue in *Missouri State Med. Ass’n*, and is equally acceptable under the Missouri Constitution.

Like the bills at issue in *C.C. Dillon* and *Missouri State Medical Association*, HB 972's purpose, and corresponding title, was changed from being restricted to one type of crime (“relating to intoxication related traffic offenses”) to crime more generally, *i.e.* “relating to crime.” But the fact that the overall scope of final version of the bill was broader than the original version does not invalidate the entire enactment. In fact, the court in *C.C. Dillon* emphasized that it will liberally interpret the purpose of a statute to

⁶ *Missouri State Med. Ass’n v. Mo. Dept. of Health*, 39 S.W.3d 837, 840 (Mo. banc 2001).

try to find no constitutional violation.⁷ The original HB 972, the Truly Agreed to and Finally Passed bill, and SB 32 dealt with criminal law, specifically creating new crimes and enhancing the penalties on existing crimes. All bills, therefore, dealt with crime. While the amendments to HB 972 did introduce new crimes and penalties, it did not involve a change in purpose so broad as to implicate the restrictions of Mo. Const. Article III, § 21.

MACE further argues that *Stroh Brewery Co. v. State*⁸ is not applicable to the facts of this case. But again, MACE argues in favor of a stricter standard than that envisioned in this court's previous holdings. In *Stroh*, this court considered a bill that as introduced contained one section "relating to the auction of vintage wine, with penalty provisions."⁹ During the legislative process, that bill took on additional amendments and eventually grew to nine sections, including the original section relating to vintage wine and other sections addressing topics such as marketing of alcohol, Sunday licenses for sale of alcohol, age requirements for sellers of alcohol, labeling requirements for malt liquor, and additional penalties for violations of the Liquor Control Law.¹⁰ Due to these expanding

⁷*C.C. Dillon Co.*, 12 S.W.3d at 325.

⁸954 S.W.2d 323 (Mo. banc 1997).

⁹*Id.*, 954 S.W.2d at 325.

¹⁰HCS/SB 933 (1996).

amendments, the finally passed bill was entitled “an act . . . relating to intoxicating beverages.”¹¹

Despite the fact that the final version of the Bill at issue in *Stroh* addressed areas with little relation to the “auction of vintage wine” (such as age requirements for sellers of alcohol), this court recognized that the original purpose of a bill must be determined at the time of introduction.¹² Thus, even though the original bill dealt only with the auction of vintage wine, the court held that other sections relating to liquor control could be added without changing its original purpose, even if the title was expanded, when those sections were generally consistent with the overarching purpose of liquor control.¹³ By the same token, all the changes that were added to HB 972 fairly relate to crime, which was the original purpose of the bill, and deference is to be afforded legislative determinations to change the law.¹⁴

Accordingly, this court should reverse the circuit court’s decision holding that §§ 67.2540, 67.2546, and 67.2552 found in Senate Substitute No. 2 for SCS HCS HB 972 are unconstitutional under Article III, § 21 of the Missouri Constitution.

¹¹*Stroh*, 954 S.W.2d at 325.

¹²*Id.*, 954 S.W.2d at 326.

¹³*Id.*

¹⁴*Missouri State Med. Ass’n*, 39 S.W.2d at 839. *See also*, *C.C. Dillon Co.*, 12 S.W.3d at 327.

II. The circuit court erred in holding that HB 972 violated Mo. Const. Article III, § 21, because the bill contained a clear title, in that the amendments pertaining to the criminal restrictions of sexually oriented businesses fairly relate to the subject of the bill (as described in the title, “relating to crime”); have a natural connection to that subject; and are a means to accomplish the law’s purpose.

MACE argues that a bill containing a title stating that the bill relates to crime is analogous to bills relating to topics as broad as property ownership, economic development, and incorporated and non-incorporated entities. It is not.

HB 972 advised legislators what it contained. The complete title of HB 972 was, “To repeal §§ 311.310, 565.024, 568.050, 577.001, and 577.023, RSMo, and to enact in lieu thereof thirteen new sections relating to crime, with penalty provisions and an emergency clause for a certain section.” The new criminal regulations on sexually oriented businesses relate to crime by criminalizing certain conduct by the businesses, their employees, and their customers.

Similarly, In *Missouri State Medical Ass’n v. Missouri Dept. of Health*¹⁵, this court held that a House bill with the title, "AN ACT To repeal [statutes] relating to health services, and to enact in lieu thereof fifteen new sections relating to the same subject," met the requirement of the Missouri Constitution that the bill's subject be clearly stated.

¹⁵ 39 S.W3d 837 (Mo. 2001).

As noted by the court, "health services" was not broad and amorphous, as it did describe most, if not all, legislation enacted, and it did not include nearly every activity that the state undertakes. Moreover, the court noted that the "clear title" provision of the state constitution was designed to prevent fraudulent, misleading, and improper legislation, by providing that the title should indicate, in a general way, the kind of legislation that was being enacted.¹⁶ In the present case, HB 972 indicates, in the same general sense, that it relates to crime. And, like in *Missouri State Medical Ass'n*, crime is not broad and amorphous, and it certainly does not describe nearly every activity in which the state partakes.

Notably, the title of proposed legislation may omit particular details of the bill without violating the "clear title" provision of the state constitution, so long as neither the legislature nor the public is misled.¹⁷ And for purposes of the "clear title" provision of the state constitution, a bill's multiple and diverse topics, absent specific itemization, can only be clearly expressed by their commonality – by stating some broad umbrella category that includes all the topics within its cover.¹⁸

Accordingly, it is not detrimental to the constitutionality of a bill that its title is broad, as the legislature is permitted to group legislation under broader categories, as opposed to itemizing individual pieces of legislation. Thus, this court has stated that the

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

words "generally indicate," as used in the requirement that the title to a legislative bill shall generally indicate what the act contains, means that the title should refer in a comprehensive manner to the subject matter of the enactment, but need not necessarily refer to subordinate matters connected therewith or reasonably within purview of a bill.¹⁹

HB 972 stated that its provisions related to crime. All provisions within HB 972 did, in fact, relate to crime. The title is not so broad as to be deceiving. Accordingly, this court should reverse the circuit court's declaration that §§ 67.2540, 67.2546, and 67.2552 found in Senate Substitute No. 2 for SCS HCS HB 972 is unconstitutional under Article III, § 23 of the Missouri Constitution.

III. The circuit court erred in holding that HB 972 violated Mo. Const. Article III, § 21, because the bill contained a single subject, in that the amendments pertaining to the criminal restrictions of sexually oriented businesses fairly relate to the subject of the bill (as described in the title, "relating to crime"); have a natural connection to that subject; and are a means to accomplish the law's purpose.

With respect to Appellant's third point on appeal, MACE argues in support of the same test applied by the circuit court – Do all of the provisions of HB 972 relate *to each other*? Accordingly, MACE reaches the same, incorrect result. This court has

¹⁹ *Edwards v. Business Men's Assur. Co. of America*, 168 S.W.2d 82 (Mo. 1942); *Graff v. Priest*, 201 S.W.2d 945 (Mo. 1947).

consistently applied a test that is more practical and faithful to the language of Mo. Const. Article III, § 23, asking: Do all of the provisions of the bill fairly relate *to the subject of the bill* as expressed in the bill's title?

As outlined by this court in *Hammerschmidt v. Boone County*:

Consistent with these rules of construction, the words “one subject” must be broadly read, but not so broadly that the phrase becomes meaningless. To that end, this court's test for determining whether a bill violates the single subject requirement of Article III, Section 23, has remained virtually the same since 1869. So long as “the matter is germane, connected and congruous,” the law does not violate the single subject rule. *State v. Mathews*, 44 Mo. 523, 527 (1869). *Cf. Westin Crown Plaza Hotel*, 664 S.W.2d at 6. (The test to determine if “a bill contains more than one subject is whether all provisions of the bill fairly relate to the same subject, have a natural connection therewith or are incidents or means to accomplish its purpose.”) From these consistent precedents we conclude that a “subject” within the meaning of Article III, Section 23, includes all matters that fall within or reasonably relate to the general core purpose of the proposed legislation. **To the extent the bill's original purpose is properly**

expressed in the title to the bill, we need not look beyond the title to determine the bill's subject (emphasis added).²⁰

Accordingly, should this court determine that HB 972 does not violate the original purpose and clear title provisions of the Missouri Constitution, the inquiry into whether the bill contains only one subject need not extend beyond an examination of the bill's title. MACE focuses considerable attention upon an examination of the sections contained within the Missouri Constitution, and HB 972's original title.²¹ But such an examination is irrelevant to a single subject challenge; this court need not look beyond the bill's title in determining whether the bill contains one subject.²²

In this respect, the title of HB 972 sets forth that the purpose or subject of the bill is “relating to crime.” LF 66. Thus, the only question with respect to the single subject inquiry is whether the sexually oriented business amendments “fairly relate” to crime, have a “natural connection to” crime, or are “a means to accomplish” relative to crime. They do.

HB 972 consists of provisions enhancing existing criminal penalties on intoxication-related driving offenses as well as criminalizing new conduct relating to the operation of sexually oriented businesses. For instance, it has provisions governing the

²⁰ 877 S.W.2d 98, 102 (Mo. 1994).

²¹ Appellee's Brief at 28-31.

²² *Hammerschmidt*, 877 S.W.2d at 102 (Mo. 1994).

Board of Probation and Parole’s supervision of prior sex offenders and a provision making it a crime for a property owner to knowingly allow a person under the age of twenty-one to drink or possess intoxicating liquor. LF 69-70 (§§ 217.735.1, 311.310.2).

It also contains sections defining the crime of involuntary manslaughter in the first degree while operating a motor vehicle in an intoxicating condition, creates the crime of the tampering with electronic monitoring equipment, and changes the definition of an “aggravated offender” for intoxication-related traffic offenses. LF 71, 73-4 (§§ 565.024.3, 575.205, 577.023). These sections, and others in HB 972, add to or revise the many statutes relating to the criminal law. Some provisions criminalize new conduct relating to sexually oriented businesses, while other provisions change existing definitions in the criminal law or add new crimes relating to intoxicated-related traffic offenses. Although its title somewhat broad (“relating to crime”), all of the provisions and the sexually oriented business amendments in HB 972 fairly relate to crime and are a means to accomplish the legislature’s goal in adding to or revising Missouri’s criminal law. The fact that some of the bill’s provisions are contained within separate statutory or chapters does not alter the indisputable fact that each of the sections “relate to crime.” Pursuant to MACE’s argument with respect to the single subject analysis, a bill could never contain provisions that were codified in separate chapters, as such codification would indicate lack of a single subject. Notably, MACE cites no cases in support of such

a position. In fact, this court has upheld single subject challenges wherein a bill contained subjects that were codified in different statutory sections.²³

Accordingly, this court should reverse the circuit court's declaration that §§ 67.2540, 67.2546, and 67.2552 found in Senate Substitute No. 2 for SCS HCS HB 972 is unconstitutional under Article III, § 23 of the Missouri Constitution.

IV. The circuit court erred in holding that HB 972's age restriction on individuals entering sexually oriented businesses violated Mo. Const. Article I, §§ 2 and 8, and the equal protection clause of the Fourteenth Amendment or the free speech clause of the First Amendment, because HB 972 did not violate the plaintiffs' equal protection or free speech rights in that the age restriction on individuals entering sexually oriented businesses is a content-neutral regulation aimed at ameliorating the adverse secondary effects of sexually oriented businesses.

Despite MACE's assertions to the contrary, there is a rational basis for the age restrictions in HB 972: it combats the adverse secondary effects of sexually oriented businesses. It is not directed at the expressive nature of the conduct.

In its response to the State's fourth Point Relied On, MACE devotes considerable to attention to arguing that the State has not set forth the manner in which the age

²³ *Fust v. Attorney General for the State of Missouri*, 947 S.W.2d 424, 428 (Mo. 1997).

restrictions in HB 972 relate to the secondary affects caused by sexually oriented businesses. MACE further argues in support of a strict scrutiny standard.

But the proper standard for review of age discrimination challenges under the Equal Protection clause is the “rational basis” test.²⁴ In *Craig v. Boren*, the U.S. supreme court indicated that the question of whether to raise or lower the age of majority relative to the state of Oklahoma’s drinking age was primarily an issue of state law.²⁵ In *Burnett v. San Francisco Police Dept.*, the California Court of Appeals held that a municipal ordinance restricting access of persons under the age of 21 to after-hours clubs did not restrict those persons’ exercise of a fundamental right of association and assembly and did not require strict scrutiny for purposes of equal protection analysis under the U.S. and California Constitutions.²⁶ Instead, the court examined whether the ordinance’s age classification bore a rational relationship to a legitimate state purpose.²⁷

MACE argues § 67.2552.4 treats employees and customers of sexually oriented businesses (“SOBs”) and employees and customers of non-SOBs differently. However, it is important to note that in addition to enjoying a deferential standard of First Amendment review, laws whose predominant purpose is the amelioration of adverse secondary effects also enjoy a deferential standard of Equal Protection review. It does not matter under

²⁴*Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991).

²⁵*Craig v. Boren*, 429 U.S. 190 (1976).

²⁶*Burnett v. San Francisco Police Dept.*, 36 Cal.App.4th 1177 (1995).

²⁷*Id.*

Equal Protection analysis that these laws regulate only sexually oriented, but not other businesses -- in other words, that these laws are not literally “content-neutral” but are instead “content-based” -- because there is a rational basis for that distinction. More significant, it generally does not matter that these laws regulate some, but not all sexually oriented businesses. That the jurisdiction “chose first to address the potential problems created by one particular kind of adult business in no way suggests that the [jurisdiction] has ‘singled out’ [that particular kind of business] for discriminatory treatment.”²⁸ Experience may motivate the jurisdiction to include the omitted businesses at some time in the future.²⁹

In addition, HB 972 is not the first occasion on which Missouri has made distinctions based upon age. Notably, Missouri has made such distinctions in other contexts, most prominently in the area of the consumption of alcohol.³⁰ If 18 year olds are allowed to work at and patronize SOB's, it is more likely that individuals under the age of 18 will make their way into SOB's. As noted by the United States Supreme Court, individuals under the age of 18 demonstrate “[a] lack of maturity and an underdeveloped sense of responsibility,” are “more vulnerable or susceptible to negative influences and

²⁸*Renton*, 475 U.S. at 52-53.

²⁹*Id.* at 53. *See also id.* at 55 n.4. (“Respondents [sexually oriented businesses] can fare no better under the Equal Protection Clause than under the First Amendment itself.”)

³⁰Right to vote, §115.133 RSMo; legal age to contract § 431.055 & 431.060 RSMo, *etc.*

outside pressures,” and the “character of a juvenile is not as well formed as that of an adult.”³¹ Missouri has made the public policy decision that preventing the adverse secondary effects of harm to those under the age of 21 will be combated by preventing them from entering SOBs.

Courts have upheld local ordinances requiring some SOBs to be dispersed away from churches, schools, and residential locations.³² Courts have upheld hours-of-operation laws similar to the ordinances requiring the businesses to close at night and on Sundays and holidays.³³ Courts have upheld laws prohibiting secluded booths that facilitate sexual activity.³⁴ Finally, courts have upheld laws similar to the law in this case limiting the number, size, and content of exterior signs.³⁵ The fact that § 67.2552.4 treats employees and customers of SOBs “differently” than other businesses does not violate plaintiffs Equal Protection or First Amendment rights. The Missouri legislature has made the decision that raising the age of customers and employees who may enter or work at SOBs from 18 to 21 will combat the adverse secondary effects associated with SOB, including reducing crime and prostitution. Section 67.2552.4 is a

³¹*Roper v. Simmons*, 543 U.S. 551, 569 (2005).

³²*Renton*, 475 U.S. at 44; *SDJ, Inc.*, 837 F.2d at 1272.

³³*Mitchell*, 10 F.3d at 139; *Star Satellite, Inc. v. Biloxi*, 779 F.2d 1074, 1077, 1079 (5th Cir. 1986).

³⁴*Mitchell*, 10 F.3d at 142-44.

³⁵*SDJ, Inc.*, 837 F.2d at 1272, 1278.

content-neutral regulation aimed at ameliorating the adverse secondary effects of sexually oriented businesses that does not violate plaintiffs' First Amendment or Equal Protection rights. Accordingly, this court should reverse the circuit court's declaration that the age restrictions in §§ 67.2540 and 67.2552 violate the First and Fourteenth Amendment to the United States Constitution and Mo. Const. Article I, §§ 2 and 8 of the Missouri Constitution.

V. The circuit court erred in holding that §§ 67.2540, 67.2546, and 67.2552 are not severable from each other because the provisions are severable in that the restrictions on sexually oriented businesses (those not the age restrictions) in HB 972 are not so essentially and inseparably connected with the age restrictions on sexually oriented businesses such that it cannot be presumed that the legislature would have enacted the remaining restrictions without the age restrictions.

Section 1.140 provides:

The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that

it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

This court has interpreted §1.140 RSMo to mean that all statutes are presumptively severable.³⁶ Furthermore, the statutory doctrine of severability permits one offending provision of a law to be stricken and the remainder to survive.³⁷

Here, there is nothing to rebut the presumption the legislature intended for the age restriction in § 67.2552.4 to be severable from the other restrictions on SOBs. In fact, the legislature suggested by structure that it is severable: it is in a different section and subsection from the other restrictions, the age restriction was placed in a separate section from the definitions contained in § 67.2540 and the viewing restrictions in § 67.2546, and in a separate subsection from the nudity and touching restrictions in § 67.2552. LF 66-9. Furthermore, the age restriction is substantively unique from the other restrictions on SOBs in HB 972. The provisions of §§ 67.2540, 67.2546, and 67.2552 are neither contingent upon the age restriction in § 67.2552.4, nor do they have anything in common with the age restriction other than they regulate SOBs. Therefore, it cannot be said that

³⁶*General Motors Corp. v. Director of Revenue*, 981 S.W.2d 561, 568 (Mo.banc 1998).

³⁷*Akin v. Director of Revenue*, 934 S.W.2d 295, 300 (Mo.banc 1996).

the age restriction is “so essentially and inseparably connected with, and so dependent upon” the other SOB regulations that it cannot be presumed that the legislature would not have enacted the SOB regulations without the age restriction.³⁸ Accordingly, in the event this court upholds the circuit court’s declaration that § 67.2552.4 violates the U.S. and Missouri Constitutions, this court should reverse the circuit court and order the remaining SOB regulations severable from the age restriction.

Conclusion

For the reasons stated above, the court should reverse the circuit court’s judgment declaring that HB 972 violated Mo. Const. Article III, §§ 21 and 23, that the age restrictions on individuals entering sexually oriented businesses violated the First and Fourteenth Amendments, and that the age restrictions could not be severed from the remaining restrictions on sexually oriented businesses.

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³⁸*Id.*

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 4,262 words, excluding the cover, and this certification, as determined by WordPerfect 9.1 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 15th day of May 2006, to:

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